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In The
Supreme Court of the United States

UNIVERSAL GUARANTY LIFE INSURANCE COMPANY, UNITED TRUST ASSURANCE COMPANY, UNITED SECURITY ASSURANCE COMPANY, FIRST COMMONWEALTH CORPORATION, and UNITED TRUST GROUP, INC.,

Petitioners,

v.

DAVID A. MORLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a decision that is inconsistent with prior decisions of this Court and that conflicts with decisions from other Circuits, the Court of Appeals for the Seventh Circuit incorrectly held that Petitioners cannot challenge a former debtor's lack of standing to file a class action lawsuit against them where the former debtor's claims were never abandoned by his bankruptcy trustees and therefore remain property of his bankruptcy estates.

2. Whether, as many courts have held, a former debtor is barred from pursuing claims against Petitioners where he represented in bankruptcy petitions and schedules that he did not have any such claims.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, unidentified putative class members are parties to the case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29(6), Petitioners, Universal Guaranty Life Insurance Company, United Trust Assurance Company, United Security Assurance Company, First Commonwealth Corporation, and United Trust Group, Inc. make the following disclosure:

United Trust Group, Inc. is a parent corporation of Universal Guaranty Life Insurance Company. United Trust Assurance Company and United Security Assurance Company have both been merged into Universal Guaranty Life Insurance Company. First Commonwealth Corporation has been merged into United Trust Group, Inc. First Southern Bancorp, Inc., a privately-held company, owns ninety-nine percent of First Southern Holdings, LLC, a privately-held company, which owns forty-two percent of United Trust Group, Inc. United Trust Group, Inc. owns 100 percent of Universal Guaranty Life Insurance Company's stock. No publicly-held company owns ten percent or more of United Trust Group, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Universal Guaranty Life Insurance Company ("Universal"), United Trust Assurance Company ("UTAC"),[1] United Security Assurance Company ("USAC"),[2] First Commonwealth Corporation ("FCC"),[3] and United Trust Group, Inc. ("United"), respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The District Court's opinion dismissing Respondent's complaint without prejudice (Appendix ("Pet. App.") 18-24) is not reported. The Court of Appeals's opinion reversing (Pet. App. 1-17) is published at 298 F.3d 609. The Court of Appeals's order denying rehearing and rehearing en banc (Pet. App. 25) is not reported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion on July 26, 2002, and denied rehearing and rehearing en banc on

[1] UTAC merged into Universal on December 31, 1992.

[2] USAC merged into Universal in 1999.

[3] FCC was merged into United Trust Group, Inc. effective June 12, 2002.

August 20, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 541 of Title 11, United States Code, provides in pertinent part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> . . .

Section 554 of Title 11, United States Code, provides:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and

> administered for purposes of section 350 of this title.
>
> (d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

STATEMENT OF THE CASE

Beginning on April 27, 1987, Morlan contracted with UTAC to sell life insurance as an independent contractor. In mid-1991, he transferred to USAC in Ohio where he also sold insurance policies as an independent contractor under an agent agreement until February 8, 1993, when his relationship with Petitioners ended.

On September 20, 1990, Morlan filed a voluntary petition for bankruptcy under Chapter 7. When Morlan completed his schedules and signed them under penalty of perjury, he stated that he had no contingent claims of any nature. Nor were Morlan's purported claims against Petitioners included in the statement of abandonment filed by the bankruptcy trustee on November 15, 1990. Morlan's debts were discharged on January 8, 1991, and his bankruptcy was closed on January 9, 1991.

On April 21, 1999, Morlan and Louis Black filed this lawsuit, alleging that they and other insurance agents who worked for Universal or UTAC were employees rather than independent contractors. They raised state law breach of contract claims in addition to claims for benefits and for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

On May 25, 1999, approximately one month after he filed this lawsuit, Morlan filed another voluntary petition for bankruptcy under Chapter 7. Morlan did not schedule his alleged claims against Petitioners in his bankruptcy papers. Morlan's debts were discharged on September 21, 1999, and the bankruptcy case was closed while this case was pending.

On January 18, 2000, Morlan filed a Second Amended Class Action Complaint in which Morlan was the sole named class representative. Black, who did not respond to any discovery, was not named as a class representative. On August 28, 2000, the District Court certified this case as a class action with Morlan as the sole class representative.

After class certification, on October 12, 2000, Morlan disclosed for the first time that he had filed bankruptcy when he responded under oath to the Interrogatories that Universal served him with on June 7, 2000, before the class was certified [Pet. App. 20, Mem. & Order (Sept. 18, 2001)].

Morlan never scheduled his claims against Petitioners in either of his bankruptcies. Furthermore, both the District Court and the Court of Appeals agreed that neither the trustee in Morlan's 1990 bankruptcy nor the trustee in Morlan's 1999 bankruptcy effectively abandoned the assignable part[4] of Morlan's claims against Petitioners

[4] Although the Court of Appeals opined that Morlan's claims for pension benefits and future welfare benefits were not assignable and therefore never became part of his bankruptcy estates [Pet. App. 2-7, Op.], Morlan in fact had no claim for pension benefits because none of the Petitioners offered any retirement or pension benefits until after

(Continued on following page)

under 11 U.S.C. § 554 [Pet. App. 20-21, Mem. & Order (Sept. 18, 2001); Pet. App. 11].

Because Morlan, the sole named class representative, lacked standing to pursue his claims as a result of his bankruptcies and because Morlan was no longer a member of the class when the class was certified, the District Court held that class certification was improper and dismissed the action without prejudice [Pet. App. 20, 23, Mem. & Order (Sept. 18, 2001)].

After the District Court dismissed the action, Morlan appealed to the United States Court of Appeals for the Seventh Circuit. In addition, Respondents refiled the class action in the Southern District of Illinois on December 10, 2001, Case No. 01-4314-JPG. Neither Morlan nor Black were named plaintiffs in the refiled action.

The United States Court of Appeals for the Seventh Circuit agreed that Morlan's bankruptcy trustee did not abandon Morlan's assignable[5] claims in compliance with Section 554 of the Bankruptcy Code [Pet. App. 11], yet held that Petitioners could not raise standing as a defense to Morlan's action against them [Pet. App. 16]. The Court of Appeals reversed the District Court's judgment with directions to reinstate Morlan's class action suit [Pet. App.

Morlan stopped working as an agent for any of the Petitioners. Likewise, because Morlan has not worked as an agent for any of the Petitioners since 1993, he has no claim for future welfare benefits under any of the plans at issue. Therefore, all of Morlan's claims are assignable and were, in effect, assigned to his bankruptcy trustees.

[5] *See supra* n.3.

17]. Subsequently, Respondents voluntarily dismissed the second class action they had filed.

REASONS TO GRANT WRIT

Petitioners respectfully request that this Court grant their petition for a writ of certiorari because this case presents "novel issues at the intersection of bankruptcy and class action law" [Pet. App. 1]. Specifically, this petition raises the issue of whether a defendant that has been sued by a debtor may challenge the debtor's lack of standing based on the fact that his claim is property of the bankruptcy estate. The decision of the United States Court of Appeals for the Seventh Circuit, which holds that a defendant "lacks standing" to challenge a debtor's standing to bring a claim against it, is inconsistent with prior decisions of this Court holding that a class action defendant has standing to raise jurisdictional issues and that it is vindicating its own rights by doing so. The decision of the Court of Appeals also conflicts with the decisions of other United States Courts of Appeals that have permitted defendants to raise a debtor's lack of standing as a defense to a lawsuit. The petition for a writ of certiorari should be granted.

ARGUMENT

I. The Decision of the Court of Appeals Is Inconsistent With Prior Decisions of This Court Permitting Class Action Defendants to Protect Their Own Interests and Ensure That Any Class Action Judgment Would Bind All Class Members.

The Seventh Circuit's decision holding that Petitioners "lack standing – standing to object to the abandonment of Morlan's claim" [Pet. App. 16], is inconsistent with prior decisions of this Court that allow class action defendants to protect their own interests when they have been sued. Petitioners have been named as defendants in a class action suit. They have the right to challenge the standing of the sole named class representative to ensure that any judgment that is eventually rendered binds all putative class members.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court was asked to determine whether a class action defendant had standing to assert the claim that Kansas lacked jurisdiction over class members "who were not Kansas residents and who had no connection to Kansas." *Id.* at 804. The named plaintiff argued that the class action defendant could not raise the issue because it could "assert only [its] own rights" and had "no standing to assert the rights of its adversary, the plaintiff class, in order to defeat the judgment in favor of the class." *Id.* at 804. In rejecting the named plaintiff's argument, this Court recognized that the issue was not whether the class action defendant possessed "standing *jus tertii*." *Id.* at 805. Rather, the class action defendant was seeking to "vindicate its own interests." *Id.*

> As a class-action defendant petitioner [was] in a unique predicament. If Kansas [did] not possess jurisdiction over this plaintiff class, petitioner w[ould] be bound to 28,100 judgment holders scattered across the globe, but none of these w[ould] be bound by the Kansas decree. Petitioner could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound.

Id. This Court held that the class action defendant's allegation that it would be injured if the class action judgment became final and did not bind the plaintiff class was "sufficient to give petitioner standing on its own right to raise the jurisdiction claim in this Court." *Id.*

Likewise, in this case, Petitioners had standing to raise the issue of Morlan's lack of standing to bring claims against them. Petitioners have been named as defendants in a class action suit.[6] As such, they have an interest in ensuring that any judgment against them is binding on all

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[6] "Th[is] Court has intimated that standing may be conferred on defendants by the mere filing of a legal action, thereby precipitating the threatened injury." *Allstate Ins. Co. v. Wayne County*, 760 F.2d 689, 695 n.6 (6th Cir. 1985) (citing *Warth v. Seldin*, 422 U.S. 490, 500 n.12 (1975), for the proposition that when a "litigant asserts the rights of third parties defensively, as a bar to judgment against him," there is no Article III standing problem, only a prudential question).

putative class members and that they cannot later be subjected to duplicative litigation.

"Standing is a jurisdictional element that must be satisfied prior to class certification." *Lee v. Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997); *see also Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (stating that prior to certification of a class, the court must determine that at least one named class representative has Article III standing to raise each claim). If Morlan's claims against Petitioners were not effectively abandoned by his bankruptcy trustees, as both the District Court and the Court of Appeals have acknowledged, his claims remain property of his bankruptcy estates, *see, e.g., In re Davis (Davis v. Avco Fin.)*, 158 B.R. 1000, 1002 (N.D. Ind. 1993); *In re Fossey (Swindle v. Fossey)*, 119 B.R. 268, 271 (D. Utah 1990), and he lacks standing to bring those claims. *See Cable v. Ivy Tech St. College*, 200 F.3d 467, 472 (7th Cir. 1999); *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988). Because standing is a jurisdictional element, any judgment rendered in favor of a class purportedly represented by Morlan would be subject to later challenge by unsatisfied class members. Petitioners have a right to challenge Morlan's lack of standing to prevent that result.

Even if Petitioners did not have standing to raise the issue of Morlan's standing, a court "has the duty to determine whether standing exists even if not raised by the parties." *Bertulli v. Independent Ass'n of Continental Pilots*, 242 F.3d 290, 294 (5th Cir. 2001); *see B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) ("federal courts are required sua sponte to examine jurisdictional issues such as standing"); *Foster v. Center Township of LaPorte County*, 798 F.2d 237, 241 (7th Cir. 1986)

(holding that a court is "obligated to consider the issue of standing, like any other question of [its] Article III jurisdiction, whether the parties have raised it or not"). If the Court must consider the issue of standing even where the parties did not raise the issue, the Court of Appeals should not have determined that Morlan could pursue his claims, which have never been abandoned as required by the Bankruptcy Code, on the basis that Petitioners could not raise the issue.

II. The Court Should Resolve the Conflict Among the Circuits Regarding a Defendant's Ability to Challenge a Debtor's Standing to Pursue Claims That Belong to the Debtor's Bankruptcy Estate.

Although the Court of Appeals for the Seventh Circuit concluded that Petitioners could not challenge Morlan's standing to pursue his breach of contract claims and ERISA claims based on his prior bankruptcies, other United States Courts of Appeals have permitted defendants who have been sued by debtors to dispute the debtor's standing. Those decisions protect defendants from potentially having to defend against the same claim twice and ensure that debtors have an incentive to disclose claims in their bankruptcy proceedings.

Indeed, defendants have successfully challenged former debtors' lack of standing in other courts. For example, in *United States of America ex rel. Gebert v. Transport Administrative Services*, 260 F.3d 909 (8th Cir. 2001), the defendant argued that the plaintiffs did not have standing to bring a qui tam action under the False Claims Act because they had previously filed bankruptcy and had not listed the potential qui tam claim on their

bankruptcy schedules. *See id.* at 913. The United States Court of Appeals for the Eighth Circuit agreed with the defendants and held that the plaintiffs lacked standing to proceed on the qui tam claim. *See id.* at 919. Although the court did not explicitly address whether the defendant could raise the former debtors' lack of standing as a defense, by upholding the summary judgment award in the defendant's favor, the court implicitly approved of the defendant's ability to do so.

Similarly, in *Vreugdenhill v. Navistar International Transportation Corporation*, 950 F.2d 524 (8th Cir. 1991), the defendants argued that the former debtor lacked standing to bring his claim because it had never been abandoned by the bankruptcy trustee and was therefore still property of his bankruptcy estate. *See id.* at 525. Despite the bankruptcy trustee's knowledge of the claim, the court concluded that the claim had not been abandoned under 11 U.S.C. § 554 because it had never been properly scheduled. *See id.* at 526. As a result, the court affirmed the award of summary judgment in the defendant's favor. *See id.*; *cf. National American Ins. Co. v. Ruppert Landscaping Co., Inc.*, 187 F.3d 439, 441-42 (4th Cir. 1999) (upholding summary judgment in favor of defendant who argued that a creditor had no standing to bring a claim that was property of the bankruptcy estate).

Likewise, numerous other courts have permitted defendants to challenge a debtor's or a former debtor's ability to bring a claim that belonged to the bankruptcy estate. *See, e.g., In re Costello (Callihan v. Costello)*, 255 B.R. 110, 113 (E.D.N.Y. 2000); *Nationwide Acceptance Corp. v. Markoff, Krasny, Goldman & Grant*, 44 Collier Bankr. Cas. 2d 1319 (N.D. Ill. 2000); *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 58-59 (S.D.N.Y.), *amended on*

other grounds, 63 F. Supp. 2d 342 (S.D.N.Y. 1999); *Correll v. Equifax Check Servs., Inc.*, 234 B.R. 8, 10 (D. Conn. 1997); *Ball v. Nationscredit Fin. Servs. Corp.*, 207 B.R. 869, 870 (N.D. Ill. 1997); *Larson v. Groos Bank, N.A.*, 204 B.R. 500, 501 (W.D. Tex. 1996); *Welsh v. Quabbin Timber, Inc.*, 199 B.R. 224, 229 (D. Mass. 1996); *In re Davis*, 158 B.R. at 1002; *Harris v. St. Louis Univ.*, 114 B.R. 647, 649 (E.D. Mo. 1990); *Krank v. Utica Mut. Ins. Co.*, 109 B.R. 668, 669 (E.D. Pa. 1990), *aff'd*, 908 F.2d 962 (3d Cir. 1990); *Hester v. Farmers Home Administration*, 49 B.R. 593, 594 (E. D. Mo. 1985).

Allowing a defendant to challenge a former debtor's standing to pursue a claim that belongs to the bankruptcy estate ensures that the defendant will not be subject to multiple suits on the same claim. In *Wieburg v. GTE Southwest Inc.*, 272 F.3d 302 (5th Cir. 2001), the defendant employer asserted that the bankruptcy trustee had exclusive standing to pursue the plaintiff's discriminatory discharge claims. *See id.* at 304. The court agreed. "Because the claims are property of the bankruptcy estate, the Trustee is the real party in interest with exclusive standing to assert them." *See id.* at 306. Rule 17(a) of the Federal Rules of Civil Procedure requires that every action shall be prosecuted in the name of the real party in interest. "The purpose of this provision is to assure a defendant that a judgment will be final and that res judicata will protect it from having to twice defend an action, once against an ultimate beneficiary of a right and then against the actual holder of the substantive right." *See id.* (internal quotations and citations omitted). As a result, the court held that the plaintiff lacked standing to pursue the claims in her own name. *See id.* at 307-08.

Like the plaintiff in *Wieburg*, Morlan should not be permitted to pursue the breach of contract and ERISA claims in his own name. When Morlan filed bankruptcy in 1990 and 1999, his claims against Petitioners became property of his bankruptcy estates. *See In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993). As the Court of Appeals recognized, those claims were never abandoned under § 554 of the Bankruptcy Code because the trustee did not provide notice of any proposed abandonment to Morlan's creditors and because the claims were never listed in Morlan's schedules of assets and liabilities as required. *See Vreugdenhill*, 950 F.2d at 526; *In re Davis*, 158 B.R. at 1002; *Stanley v. Sherwin-Williams Co.*, 156 B.R. 25, 26 (W.D. Va. 1993). Morlan had ample opportunity to schedule his claims against Petitioners while his 1999 bankruptcy was pending or to attempt to reopen his bankruptcies and request that the claims be abandoned. He never made any attempt to do so. Therefore, his claims remain property of the bankruptcy estates, and Petitioners should be permitted to question his standing.

Permitting a defendant to challenge a former debtor's standing to pursue a claim that belongs to the bankruptcy estate encourages full disclosure of claims in bankruptcy proceedings. *See Krank*, 109 B.R. at 669 ("To hold [that a plaintiff could assert his cause of action without proof of abandonment] would allow plaintiff to conceal potential assets from his creditors."). Obviously, debtors should have incentives to list all their claims in bankruptcy.

The decision of the Court of Appeals, however, creates a perverse incentive for debtors to conceal claims that should be listed in their bankruptcy schedules. Under the Seventh Circuit's reasoning, a debtor may avoid the strict statutory requirements for abandonment imposed by the

Bankruptcy Code by not listing claims that he may want to pursue himself, wait until the bankruptcy is closed, and then attempt to reap the benefits of his claim anyway, hoping that the court will apply a lesser test for abandonment, as the Seventh Circuit did.[7] Allowing defendants to dispute a former debtor's standing on the ground that his claims remain property of his bankruptcy estate would avoid such a result.

III. As Several United States Courts of Appeals Have Recognized, Morlan is Estopped From Pursuing His Claims Against Petitioners Because He Did Not Schedule His Claims in His Bankruptcies.

In addition, because Morlan failed to schedule his claims against Petitioners in his bankruptcies, he is estopped from pursuing those claims.[8] Judicial estoppel is an equitable concept intended to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine,* 532 U.S. 742, 749-50 (2001). "The doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir.

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[7] By applying a lesser test for abandonment and allowing Morlan to pursue his claims in his own name, the Court of Appeals has effectively held that Morlan is not bound by the statutory abandonment requirements and does not face the same obstacles to reopening his bankruptcies that any creditor who attempted to seize the claims would face.

[8] Although Petitioners argued judicial estoppel in their brief, the Court of Appeals did not address the issue.

2002); *see Chandler v. Samford Univ.*, 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999). It is designed to prevent the parties from making a mockery of justice by inconsistent pleadings. *American Nat'l Bank of Jacksonville v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983).

Numerous courts, including several United States Courts of Appeals, have applied the principle of judicial estoppel to prevent debtors from concealing their claims in bankruptcy only to pursue them after receiving a discharge. "Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001). "[N]otifying the trustee by mail or otherwise [about a claim] is insufficient to escape judicial estoppel." *Id.* Thus, in *Hamilton*, the court held that a former debtor was precluded "from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings." *Id.*

> "The rationale for . . . decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding."

Id. at 785 (quoting *In re Coastal Plains*, 179 F.3d 197, 208 (5th Cir. 1999)).

In *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002), the court applied judicial estoppel to bar the debtor from pursuing discrimination claims against his former employer where the debtor filed and pursued those claims while his bankruptcy was pending but failed to amend his financial statements to include the claims. *See id.* at 1287-88.

> Allowing [the debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets.

Id. at 1288; *see also Gebert*, 260 F.3d at 912 (holding that former debtors were judicially estopped from bringing qui tam action under the False Claims Act because they had not disclosed the claim in bankruptcy); *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir. 1993) (holding that debtor was judicially estopped from pursuing claims that were not disclosed in bankruptcy); *Hay v. First Interstate Bank of Kalispell*, 978 F.2d 555, 557 (9th Cir. 1992) (holding that debtor was judicially estopped from asserting claims where debtor knew about the claims before bankruptcy and they should have been disclosed); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419-20 (3d Cir. 1988) (holding that plaintiff's failure to disclose potential claims against defendant in bankruptcy judicially estopped the plaintiff

from asserting claims); *Traylor v. Ford*, 185 F. Supp. 2d 1338, 1339 (N.D. Ga. 2002) (holding that judicial estoppel prevented plaintiff from pursuing a discrimination claim when he failed to disclose it in bankruptcy); *Lott v. Sally Beauty Co., Inc.*, 88 Fair Empl. Prac. Cas. (BNA) 669 (M.D. Fla. 2002) (barring debtor from pursuing sexual harassment lawsuit because she failed to disclose a charge pending with the EEOC at the time she filed her bankruptcy petition); *Chandler*, 35 F. Supp. 2d at 864-65 (holding that plaintiff was judicially estopped from proceeding with an employment discrimination claim that she had failed to disclose in bankruptcy where she had an affirmative duty to disclose the claim and a motive to conceal the claim); *Rosenshein v. Kleban*, 918 F. Supp. 98, 104-05 (S.D.N.Y. 1996) (granting summary judgment on grounds of judicial estoppel because plaintiffs failed to list a claim as an asset in bankruptcy even though they were aware of the claim before filing bankruptcy).

"[Morlan] sought and obtained a discharge from his debts . . . without disclosing his potential claims . . . either in his original schedule or in any amendment thereto." *Welsh*, 199 B.R. at 299; *see also Kunica*, 233 B.R. at 58-59 (holding that former debtor that failed to disclose claims in bankruptcy was judicially estopped from asserting those claims). Because Morlan did not list his claims against Petitioners in any schedule in either of his bankruptcies and because he signed those schedules under penalty of perjury, Morlan is estopped from pursuing those claims. Petitioners should be permitted to challenge Morlan's ability to pursue his claims on the ground of estoppel as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the

United States Court of Appeals

for the Seventh Circuit

No. 01-3795

DAVID A. MORLAN,

Plaintiff-Appellant,

v.

UNIVERSAL GUARANTY LIFE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 99 C 274 – **G. Patrick Murphy**, *Chief Judge.*

ARGUED MAY 28, 2002 – DECIDED JULY 26, 2002

Before BAUER, POSNER, and WILLIAMS, *Circuit Judges.*

POSNER, *Circuit Judge.* This appeal from the dismissal of a class action presents novel issues at the intersection of bankruptcy and class action law. A procedural chronology will help in framing them.

April 1999. David Morlan files this class action suit as the representative of a class of insurance agents of the defendants, affiliated insurance companies that maintain employee welfare benefit plans. 29 U.S.C. § 1002(1). Morlan's suit charges that the defendants, in breach of the fiduciary duty that ERISA imposes on fiduciaries of pension and welfare plans, see 29 U.S.C. § 1109(a),

improperly treated him and the other members of the class as independent contractors, when actually they were employees of the defendants and so were entitled to the health, vacation, and other benefits to which the defendants' plans entitled the defendants' acknowledged employees.

May 1999. Morlan files for bankruptcy.

September 1999. The bankruptcy court (1) orders Morlan's debts discharged, on the basis of the trustee's report that the estate in bankruptcy has no assets and that consequently the trustee has made no distribution to the creditors, and (2) dismisses the bankruptcy proceeding.

January 2000. Morlan files an amended complaint in the class action suit.

August 2000. The suit is certified by the district court as a class action with Morlan the only named plaintiff.

September 2001. Having learned about the bankruptcy, the district judge decertifies the class in Morlan's ERISA suit and dismisses the suit without prejudice. Morlan's claim under ERISA, the judge reasons, became an asset of the estate in bankruptcy and was not abandoned by the trustee. So when the class was certified, the named plaintiff (Morlan) had no standing to sue because he did not own the claim that he was suing upon.

Morlan asks us to reverse the dismissal of his suit.

The dismissal presupposes the assignability of Morlan's ERISA claim to the trustee in bankruptcy; if it was assignable and assigned, it became property of the estate in bankruptcy, as in *In re Polis,* 217 F.3d 899, 901 (7th Cir.

2000); if it was not assignable, Morlan rather than the trustee was entitled to sue to enforce it.

ERISA requires pension plans to include a provision forbidding the assignment or alienation (these are synonyms, *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549, 552 (7th Cir. 1997), except that the addition of "alienation" to "assignment" makes crystal clear that the anti-assignment provision bars involuntary as well as voluntary assignments) of pension-plan benefits, 29 U.S.C. § 1056(d)(1); *Plumb v. Fluid Pump Service, Inc.*, 124 F.3d 849, 863 (7th Cir. 1997), and thus keeps such property out of the plan participant or beneficiary's estate in bankruptcy. 11 U.S.C. § 541(c)(2); *Patterson v. Shumate,* 504 U.S. 753, 760 (1992); *In re Weinhoeft,* 275 F.3d 604, 605 (7th Cir. 2001). Some types of claim are nonassignable voluntarily but assignable involuntarily, as in *In re Polis, supra,* 217 F.3d at 901. Tort claims, for example, normally are not assignable, but they do become property of the claimant's estate in bankruptcy by operation of bankruptcy law. ERISA's anti-assignment clause, however, as the *Patterson* and *Weinhoeft* cases make clear, bars the latter type of assignment as well.

ERISA imposes no similar requirement on welfare plans; nor do the plans at issue in this case contain a clause forbidding assignment or alienation. Since, however, Morlan's claim is in part a claim for pension benefits, in part it is indeed nonassignable; and so the dismissal of his suit was improper. But it will make a difference on remand whether he can sue on all or only the pension part of his claim; and so we proceed to a consideration of whether the part of his claim that concerns welfare benefits was assignable.

Several cases hold that welfare benefits are generally nonassignable, just as pension benefits are, despite the absence of a counterpart to section 1056(d)(1) applicable to welfare benefits. These cases reason that because ERISA authorizes suits for plan benefits only by participants, beneficiaries, fiduciaries, or the Secretary of Labor, 29 U.S.C. § 1132(a), an assignee who does not come under one of these descriptions is ineligible to maintain the suit. See, e.g., *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1080-82 (9th Cir. 2000).

The cases, it is true, carve an exception for medical benefits assigned to a health-care provider in exchange for health care, a common method of financing such care. See, e.g., *Principal Mutual Life Ins. Co. v. Charter Barclay Hospital, Inc.*, 81 F.3d 53, 55-56 (7th Cir. 1996). That would not support a conclusion that Morlan's ERISA claim for welfare benefits was assignable to the trustee in bankruptcy, however, because the trustee is not a health-care provider. Our court has a case of that sort, but our opinion in that case takes no position on whether other types of welfare benefit are assignable and if so whether there is any restriction on who the assignees may be. *Plumb v. Fluid Pump Service, Inc., supra,* 124 F.3d at 863 and n. 15. However, in *Kennedy v. Connecticut General Life Ins. Co.*, 924 F.2d 698, 700 (7th Cir. 1991), we rejected the reasoning later adopted in cases like *Simon* by holding that a properly assigned ERISA claim makes the assignee a participant or beneficiary within the meaning of the Act.

Only the Fifth Circuit has actually held that claims for such benefits are assignable without restrictions. The principal case is *Hermann Hospital v. MEBA Medical & Benefits Plan,* 845 F.2d 1286, 1289 (5th Cir. 1988), which, though it too concerned health benefits, based its holding

that they are assignable on the absence of a statutory provision forbidding their assignment, a ground independent of the nature of the welfare benefits or whom they are assigned to. Another Fifth Circuit decision, *Texas Life, Accident, Health & Hospital Service Ins. Guaranty Ass'n v. Gaylord Entertainment Co.*, 105 F.3d 210, 214-15 (5th Cir. 1997), holds that claims for welfare benefits are assignable regardless of their nature, though the ground of the decision (a ground equally applicable to pension plans, by the way – and *Texas Life* involved a pension plan, not a welfare plan) is one we have difficulty understanding. It is that benefits, and a claim that benefits were withheld in breach of the plan administrator's fiduciary obligations, are different animals, so that the statutory anti-assignment provision is interpretable as forbidding assignment of benefits but not of benefit claims that have matured into causes of action.

Now that we must decide the issue, we hold that claims for welfare benefits, not limited to health-care benefits, are assignable, provided of course that the ERISA plan itself permits assignment, assignability being a matter of freedom of contract in the absence of a statutory bar. *Kennedy v. Connecticut General Life Insurance Co., supra,* 924 F.2d at 700. The absence of a counterpart to the anti-assignment provision for pension plans is telling; and in this regard we do not understand how the courts that have held welfare benefits nonassignable square their conclusion with the Supreme Court's decision in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837-38 (1988), which held that, precisely because there is no anti-assignment provision for welfare plans, ERISA does not prohibit a state from garnishing benefits payments due plan participants. See *In re Taft,* 184 B.R. 189,

191 (E.D.N.Y. 1995). Garnishment and an assignment for the benefit of creditors are the same kind of animal.

Pertinent too is the general principle of the law that contractual claims (which is the essential character of claims to benefits pursuant to private pension or welfare plans) for the payment of money are assignable. *In re New Era, Inc.*, 135 F.3d 1206, 1210 (7th Cir. 1998); *Citibank, N.A. v. Tele/Resources, Inc.*, 724 F.2d 266, 268 (2d Cir. 1983); *Collins Co. v. Carboline Co.*, 532 N.E.2d 834, 841 (Ill. 1988); E. Allan Farnsworth, *Contracts* § 11.2, p. 707 (3d ed. 1999). This principle, however, comes with an important exception, which turns out to be pertinent to this case, for cases in which "the personal acts and qualities of one of the parties form a material part of the contract." *First Illinois National Bank v. Knapp,* 615 N.E.2d 75, 77-78 (Ill. App. 1993). If you made a contract with John Singer Sargent for him to paint your portrait, he could not assign his contractual duty to another painter without your consent. Nor could you assign your automobile liability insurance policy to another driver, since he might be in a different risk class from you. And likewise Morlan could not assign to the trustee in bankruptcy his right to participate in his employer's welfare benefits plans, thus substituting the trustee, or the creditors, for himself – that would be nonsensical.

Insofar as Morlan is seeking past monetized or monetizable benefits, this problem does not arise, because such a claim is independent of all personal differences between Morlan on the one hand and the trustee or creditors on the other, and so it is assignable. But he is claiming both past and future benefits, and, consistent with the "personal obligations" doctrine, the future benefits are not assignable – so here is another piece of his claim that, like his

claim for pension benefits, clearly remained with him despite the bankruptcy. Still, the conclusion from the analysis thus far is that the trustee could take over at least a chunk, for all we know the biggest chunk, of Morlan's claim as an asset of the bankrupt estate, and this conclusion requires us to consider whether that chunk was revested in Morlan, enabling him to sue to enforce it in his class action suit. If it was not revested, if it was not his property, he did not have standing to sue for it. For if it was not his property he would not benefit from an order requiring the defendants in the class action suit to render up the property.

After a suit is certified as a class action, a loss of standing by the named plaintiff does not destroy or (if it affects just one of several claims) curtail the federal court's jurisdiction; he can be replaced by a member of the class who has standing. *Parole Commission v. Geraghty,* 445 U.S. 388, 398 (1980). But until certification, the jurisdiction of the district court depends upon its having jurisdiction over the claim of the named plaintiffs when the suit is filed and continuously thereafter until certification, *Walters v. Edgar,* 163 F.3d 430, 432 (7th Cir. 1998); *Nelson v. Murphy,* 44 F.3d 497, 500 (7th Cir. 1995); *Lusardi v. Xerox Corp.,* 975 F.2d 964, 974-75 (3d Cir. 1992), because until certification there is no class action but merely the prospect of one; the only action is the suit by the named plaintiffs. Morlan declared bankruptcy in May 1999, before the class was certified. Upon that declaration he lost the chunk of his ERISA claim that we're concerned with in this part of the opinion; it fell into the estate in bankruptcy. But in September the bankruptcy proceeding was dismissed, and there is an argument, as we're about

to see, that the effect of that dismissal was to revest Morlan with his entire claim.

That might seem too late to save Morlan's standing to sue on the entire claim were it not for his having filed an amended complaint in January 2000. That filing cured any problem. Quite apart from the relation-back doctrine of Fed. R. Civ. P. 15(c), which allows even jurisdictional defects in the original complaint to be cured provided the amended complaint relates back, as this one did, e.g., *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 163 (2d Cir. 2001) (per curiam); *Black v. Secretary of Health & Human Services*, 93 F.3d 781, 790 (Fed. Cir. 1996); *Flores v. Cameron County*, 92 F.3d 258, 272-73 (5th Cir. 1996), the filing of the amended complaint was the equivalent of filing a new suit, and so it wouldn't matter had there been no jurisdiction over Morlan's original suit, *Illinois ex rel. Barra v. Archer Daniels Midland Co.*, 704 F.2d 935, 939 (7th Cir. 1983); *Sun Refining & Marketing Co. v. Rago*, 741 F.2d 670, 672 (2d Cir. 1984); see also *Carver v. Condie*, 169 F.3d 469, 472 (7th Cir. 1999); *Duda v. Board of Education*, 133 F.3d 1054, 1057 (7th Cir. 1998); *Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992), unless one wanted to make a fuss over the filing fee. The only significance of relation back is avoidance of the bar of the statute of limitations, *Flores v. Cameron County, supra*, 92 F.3d at 272-73, and that is not an issue here.

Clearly, then, if the assignable part of Morlan's ERISA claim, having been transferred to the estate in bankruptcy by operation of law when Morlan filed for bankruptcy, was abandoned before the amended complaint was filed, he could sue to enforce it, because the effect of a trustee's abandoning a claim is to revest the ownership of it in the

debtor. E.g., *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1346 n. 9 (7th Cir. 1987); *Catalano v. Commissioner*, 279 F.3d 682, 685 (9th Cir. 2002); *In re Interpictures Inc.*, 217 F.3d 74, 76 (2d Cir. 2000) (per curiam). And actually, despite the attention we've been paying to getting the sequence right, the sequence doesn't matter; for when property of the bankrupt is abandoned, the title "reverts to the bankrupt, nunc pro tunc, so that he is treated as having owned it continuously." *Wallace v. Lawrence Warehouse Co.*, 338 F.2d 392, 394 n. 1 (9th Cir. 1964); see also *Sessions v. Romadka*, 145 U.S. 29, 51-52 (1892); *Catalano v. Commissioner, supra*, 279 F.3d at 685; *In re Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990) (per curiam). The purposes of retroactive vesting include to protect against the running of the statute of limitations, *Sessions v. Romadka, supra*, 145 U.S. at 52, and to compensate the trustee for any cost he may have incurred in maintaining the property during his custody of it. *Brown v. O'Keefe*, 300 U.S. 598, 602-03 (1937) (Cardozo, J.).

In arguing that the trustee abandoned Morlan's claim, Morlan points to four things: the tape recording of a creditors' meeting at which he stated under oath in response to a question from the trustee about his assets: "I think I might be involved in a class action lawsuit involving an insurance company I used to work for"; a letter from the trustee to Morlan's lawyer stating that the trustee had decided to "abandon any claim the bankruptcy estate might have to any future proceeds arising from that lawsuit"; the "trustee's report of no distribution and statement of abandonment of property," submitted to the bankruptcy court; and the bankruptcy judge's order approving "the Trustee's statement of abandonment and

report of no distribution," discharging the trustee, and closing the "no asset" case.

No doubt the trustee wanted and intended to abandon Morlan's claim. But the defendants argue, and the district court agreed, that the trustee's attempt to abandon failed because the trustee failed to comply with the statutory requirements for abandoning an asset that is part of the debtor's estate. The requirements are exacting, in recognition of the potential harm to creditors from the trustee's abandoning property to which they would otherwise be entitled because it is property of the estate in bankruptcy, and of the fact that "abandonment is revocable only in very limited circumstances, such as 'where the trustee is given incomplete or false information of the asset by the debtor, thereby foregoing a proper investigation of the asset.'" *Catalano v. Commissioner, supra,* 279 F.3d at 686.

So let us consider the requirements for effective abandonment. The Bankruptcy Code provides that "after notice and a hearing," the trustee, either on his own volition or under order by the bankruptcy court, "may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). In addition, property that the bankruptcy court orders the trustee to abandon is deemed abandoned, § 554(b), and likewise property that has been scheduled, § 521(1), but "not otherwise administered at the time of the closing of a case." § 554(c). Property not abandoned under one of these three subsections remains property of the debtor's estate – "unless the court orders otherwise." § 554(d).

Section 521(1), to which subsection 554(c) refers, requires the debtor to file (so far as bears on this case) a

schedule of his assets. Morlan did so, but he did not list his ERISA claim on the schedule, and so abandonment was not authorized by section 554(c). As for section 554(a), the trustee did not notify the creditors that he was considering abandoning Morlan's claim, or conduct a hearing on the matter. Of course, if after notice the creditors don't want a hearing, the failure to conduct one would not nullify the abandonment. A requirement of "notice and a hearing" really means notice and *the opportunity for* a hearing. In fact the Bankruptcy Code is explicit in defining "after notice and a hearing" as "authorizing an act without an actual hearing if such notice is given properly" *and* no interested party requests a hearing. 11 U.S.C. § 102(1)(B). See *In re Trim-X, Inc.*, 695 F.2d 296, 300 (7th Cir. 1982). But there was no notice here and so section 554(a) isn't available either. Nor is (b) – the bankruptcy judge did not order the trustee to abandon anything.

As for subsection (d), the bankruptcy judge's order closing the case as a no-asset, no-distribution bankruptcy in part on the basis of a "statement of abandonment" might seem interpretable as the "order[ing] otherwise" to which the subsection refers. But no, because the statement of abandonment that the trustee submitted to the bankruptcy court and that the court in effect incorporated by reference in its order says only that "any *scheduled* property is abandoned" (emphasis added), and Morlan's ERISA claim was not scheduled.

We conclude that the abandonment of the assignable and thus assigned part of Morlan's claim by the trustee was not in compliance with section 554 and was therefore ineffective. But this does not end the case. We must decide what the consequences of noncompliance were and specifically whether they included dismissal of the class action.

Clearly not dismissal in its entirety, since part of Morlan's claim was nonassignable; but dismissal of the assignable part of the claim. In addressing this question we begin by noting that it was virtually inevitable that the trustee would abandon the claim, precisely because it was the claim of the representative plaintiff in a class action suit, albeit a suit not yet certified for class action treatment. What trustee in bankruptcy would think it worthwhile to insert himself in the place of the named plaintiff? We are not surprised to find very few cases in which trustees in bankruptcy have done so. Compare *In re Polis, supra,* 217 F.3d at 903-04. The named plaintiff in a class action usually has only a small stake in the action, *Culver v. City of Milwaukee,* 277 F.3d 908, 910, 913 (7th Cir. 2002); *White v. Sundstrand Corp.,* 256 F.3d 580, 586 (7th Cir. 2001), and while the stakes for the class as a whole may be large, very few of the benefits of settling the class action or prosecuting it to judgment would be received by the trustee (which is to say the creditors), since he would just be the named plaintiff's surrogate. Most of the benefits would go to the other members of the class and to the lawyers for the class, so that the trustee, as class representative yet having fiduciary obligations exclusively to the estate in bankruptcy, would have a potential conflict of interest, as noted in the only cases we've found in which a trustee in bankruptcy did attempt to prosecute a class claim. *Maddox & Starbuck, Ltd. v. British Airways,* 97 F.R.D. 395, 397 and n. 2 (S.D.N.Y. 1983); *In re Plywood Anti-Trust Litigation,* 76 F.R.D. 570, 579 (E.D. La. 1976); *In re Ball,* 201 B.R. 204, 207 (Bankr. N.D. Ill. 1996). If despite this the trustee did take over rather than abandon the named plaintiff's claim and status as class representative, he would quickly resign the representative role to someone else. In the normal case and probably in this case

the trustee's involving himself in the class action suit even just to the extent of unburdening himself of the role of class representative would not be worth the bother. That is doubtless why he tried to abandon Morlan's claim.

Likewise it is doubtful that any of Morlan's creditors would have wanted the trustee to involve himself in the class action, though this would depend on the value of Morlan's claim, which we don't know. The expenses the trustee incurred in prosecuting the claim would be subtracted from the assets of the estate in bankruptcy, though it turned out there were no other assets – another good reason for abandonment of the debtor's claim: how was the trustee to finance the class action? The creditors, or at least those who attended the creditors' meeting (a potentially significant qualification), knew from Morlan's statement at the creditors' meeting that Morlan had another, an unscheduled, asset, consisting of a legal claim of some sort, and so they could have objected, invoking section 554, when they learned that the trustee intended to treat the bankruptcy as a no-asset, no-distribution bankruptcy. We cannot find any indication in the record that the trustee formally notified the creditors in advance that he would treat Morlan's bankruptcy so, though they could have guessed it from the fact that Morlan's schedule of assets filed in the bankruptcy proceeding lists only some clothing and other personal effects of small value. The creditors didn't object to the closing of the case without any payment to them and it is now nearly three years since it was closed and during this period no creditor has moved to reopen it (see 11 U.S.C. § 350(b); *In re Shondel*, 950 F.2d 1301, 1306 (7th Cir. 1991); *Miller v. Shallowford Community Hospital, Inc.*, 767 F.2d 1556, 1559 n. 4 (11th Cir. 1985) (per curiam)) on the ground that the debtor's

estate contained an asset after all, namely the ERISA claim (or on any other ground, for that matter).

By this time, any claim the creditors might have to step into Morlan's shoes in the class action may well have been abandoned or otherwise forfeited. See *In re FBN Food Services, Inc.*, 82 F.3d 1387, 1395-96 (7th Cir. 1996); *In re Haker*, 411 F.2d 568, 569 (5th Cir. 1969) (per curiam). With no fixed time limits on reopening a bankruptcy proceeding analogous to the limits in some subsections of Fed. R. Civ. P. 60(b), see Fed. R. Bankr. P. 9024; *In re Bianucci*, 4 F.3d 526, 528 (7th Cir. 1993); *In re Emmerling*, 223 B.R. 860, 864-65 (2d Cir. BAP 1997), the equitable origins and character of bankruptcy point to laches as the proper doctrinal guide to cutting off belated efforts to reopen. See, e.g., *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 181 (7th Cir. 1994); *In re Bianucci, supra*, 4 F.3d at 528; *In re Centric Corp.*, 901 F.2d 1514, 1519 (10th Cir. 1990); *In re Ridill*, 1 B.R. 216, 218 (C.D. Cal. 1979). Laches requires a showing of (1) unwarranted delay (2) prejudicial to the party opposing the reopening, e.g., *National R.R. Passenger Corp. v. Morgan*, 122 S.Ct. 2061, 2077 (2002); *Cox v. McBride*, 279 F.3d 492, 494 (7th Cir. 2002), and might well bar a reopening here, because of the combination of the creditors' failure to pursue the revelation at their meeting that Morlan had a legal claim with the prejudice to Morlan's class action suit should the creditors at this late date seek to intervene to take back a chunk of it. Still, we hesitate to be too emphatic in this suggestion since, as noted earlier, not all the creditors may have been present at the creditors' meeting, and anyway Morlan's reference there to his claim was vague and fleeting.

And there is a distinct possibility that at least when the class was certified back in March 2000, only six

months after the bankruptcy proceeding ended, the creditors could have persuaded the bankruptcy court to reopen it and could have established in the reopened proceeding that part of the ERISA claim really did belong to the debtor's estate rather than to the debtor personally. But this possibility does not show that Morlan lacked standing to sue to enforce that part of the claim when the class was certified. That the creditors might be able to reopen the bankruptcy proceeding and wrest a piece of Morlan's ERISA claim from him placed a cloud over his title, but standing does not require a perfectly clear title to the claim sued upon. *United States v. $557,933.89, More or Less, in U.S. Funds,* 287 F.3d 66, 75, 78-79 (2d Cir. 2002); *United States v. Rodriguez-Aguirre,* 264 F.3d 1195, 1204 (10th Cir. 2001). This is a corollary of the probabilistic character of the requirement of standing, upon which we have commented in other cases, such as *Diaz v. Duckworth,* 143 F.3d 345, 347 (7th Cir. 1998), and *Price v. Pierce,* 823 F.2d 1114, 1118 (7th Cir. 1987); see also *Hohn v. United States,* 262 F.3d 811, 818 (8th Cir. 2001). "A reasonable probability that a plaintiff will get an apartment that he wants sooner if he wins his suit is a sufficiently tangible expected benefit of suit to confer standing under the liberal principles that prevail nowadays," as we said in *Price;* and likewise here, because when the class was certified there was a reasonable probability (since ripened into a near certainty) that Morlan would be able to keep any proceeds from the suit rather than having to turn them over to his creditors. It would help in assessing this probability to know the size of the assignable portion of Morlan's claim; the smaller it was, the less likely a reopening; but the probability falls so far short of certainty as not to disturb our conclusion that Morlan had a sufficient interest in the assignable portion of the claim to have

standing to sue to enforce it. The defendants' argument amounts to saying that they, because Morlan's creditors might still try to take away Morlan's claim from him, cannot be sued; that they, because the trustee or the bankruptcy judge may have dropped the ball, are to get off scot free. We cannot see the sense of that.

This way of putting their argument suggests, moreover, an alternative basis for rejecting the defendants' challenge to Morlan's standing. The steps that the trustee took to abandon Morlan's claim would suffice to establish abandonment under the ordinary principles applicable to abandonment, e.g., *United States v. Locke,* 471 U.S. 84, 98 (1985); *Vieux v. East Bay Regional Park District,* 906 F.2d 1330, 1341 (9th Cir. 1990); *People ex rel. Illinois Historic Preservation Agency v. Zych,* 710 N.E.2d 820, 825 (Ill. 1999), a fundamental doctrine of property law; it is only the provisions of the Bankruptcy Code regarding abandonment that cast doubt on whether Morlan's claim really did revest in him. But those provisions are intended for the benefit of creditors, none of whom complained or is complaining about the trustee's failure to comply with them. They are not intended for the benefit of alleged violators of the debtor's legal rights, and so the defendants are the ones who lack standing – standing to object to the abandonment of Morlan's claim. See *Warth v. Seldin,* 422 U.S. 490, 500 n. 12 (1975); *North Shore Gas Co. v. E.P.A.,* 930 F.2d 1239, 1243 (7th Cir. 1991). The possession of a legally protectable interest is a prerequisite to suing because otherwise the possessor of that interest would find himself unable to enforce it if another person, an officious intermeddler, had brought suit to enforce it (like a bounty hunter) first. *Singleton v. Wulff,* 428 U.S. 106, 114 (1976) (plurality opinion); *People Organized for Welfare &*

Employment Rights (P.O.W.E.R.) v. Thompson, 727 F.2d 167, 173 (7th Cir. 1984); *Frank Rosenberg, Inc. v. Tazewell County,* 882 F.2d 1165, 1170 (7th Cir. 1989); *Joyner v. Mofford,* 706 F.2d 1523, 1526-27 (9th Cir. 1983). This principle has been enforced with particular stringency precisely in bankruptcy proceedings, to prevent confusion over the ultimate ownership of the assets formerly owned by the bankrupt. *In re Westwood Community Two Ass'n, Inc.,* No. 01-14473, 2002 WL 1299123, at * 2 (11th Cir. June 13, 2002); *In re Troutman Enterprises, Inc.,* 286 F.3d 359, 364 (6th Cir. 2002); *In re PWS Holding Corp.,* 228 F.3d 224, 248 (3d Cir. 2000); *Kane v. Johns-Manville Corp.,* 843 F.2d 636, 643, 644 (2d Cir. 1988). Given the strong possibility that an effort by Morlan's creditors at this late date to seize his legal claim would be barred by the doctrine of laches, no one can be said to have a higher title to the claim than he, so that if he lacks standing, no one has standing.

The judgment is reversed with directions to reinstate Morlan's class action suit.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAVID A. MORLAN, Individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	**CIVIL NO. 99-274-GPM**
UNIVERSAL GUARANTY LIFE INSURANCE COMPANY, UNITED TRUST ASSURANCE COMPANY, UNITED SECURITY ASSURANCE COMPANY, UNITED TRUST GROUP, INC., and FIRST COMMONWEALTH CORPORATION,	)	**(Filed Sep. 18, 2001)**
Defendants.	)	

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

On August 15, 2001, this Court issued a Memorandum and Order (Doc. 130) directing the parties to brief the issue of class representative David A. Morlan's standing to bring this action, which was raised in part by Defendants in their motion to dismiss or, alternatively, to decertify (Doc. 83). The parties have filed their responsive briefs (Docs. 131, 132), and the Court finds that a hearing is unnecessary. The Court also finds no reason to reiterate the facts and procedural history contained in its previous Memorandum and Order.

The issue of a party's standing is a component of the case-or-controversy analysis and, thus, "bears on the power of a court to entertain the party's complaint." *Foster v. Center Township of LaPorte County*, 798 F.2d 237, 241 (7th Cir. 1986). Therefore, federal courts "are obligated to consider the issue of standing, like any other question of our Article III jurisdiction, whether the parties have raised it or not." *Id.* Seventh Circuit jurisprudence is clear that if after *proper* certification of the class, something later happens to make the class representative no longer an appropriate representative, the class action can be kept alive by the appointment of a new class representative. *See e.g., Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1158 (7th Cir.), *cert. denied*, 528 U.S. 824 (1999); *Whitlock v. Johnson*, 153 F.3d 380, 383-84 (7th Cir. 1998) (holding that "[a] properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff"). Generally, the motion for class certification must be made prior to the expiration of the named plaintiff's claim. *Foster*, 798 F.2d at 245 (recognizing that "the Supreme Court has entertained the fiction that, upon certification, the class obtains a legally cognizable interest independent of that of the named plaintiff, that relates back to the date of the original motion for certification"). Yet, in *Walter v. Edgar*, 163 F.3d 430 (7th Cir. 1998), the Seventh Circuit Court of Appeals placed an emphasis on standing at the time an action is filed and held that the "suit was properly dismissed [by the district court] for want of standing, dooming the class action because [the plaintiffs] lacked standing when they filed the suit rather than losing standing after the class was certified." 163 F.3d at 437. That holding leaves a gap into which this present action falls and a question that remains to be answered – what is the significance of changes

in circumstances arising after the action is filed but before it is certified?

This Court is faced with a situation that the case law does not appear to squarely address. Two named Plaintiffs, David A. Morlan and Louis L. Black, filed this action in April 1999 on behalf of themselves and all others similarly situated (Doc. 1). In June 1999, they filed their first amended class action complaint (Doc. 9). However, on January 18, 2000, Plaintiff Morlan *only* filed a second amended class action complaint on behalf of himself and all others similarly situated (Doc. 43). For whatever reason, Black was voluntarily withdrawn from this action as a named plaintiff. Morlan filed a motion for class certification in March 2000, and in August 2000, the Court granted that motion and designated Morlan as the class representative (Doc. 77). Thereafter, the facts surrounding Morlan's two bankruptcies in 1990 and 1999 were disclosed. Thus, in this case, both Morlan's and Black's circumstances changed between the filing of this action and its certification as a class action.

Taking all of the facts into consideration, the Court is convinced that class certification was improper.[1] Even if, as Plaintiff argues, he retained some or all of his claims after his 1990 bankruptcy, he was no longer a member of the putative class when the motion for class certification was filed on March 10, 2000, as a result of his 1999 bankruptcy. Therefore, he was not an adequate class representative.[2] Amending the certification order or substituting

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[1] Again, the Court notes that Morlan's bankruptcies were not brought to its attention prior to certification.

[2] The Court finds that the January 5, 2001, letter written by the bankruptcy trustee and sent to Plaintiff's counsel (Doc. 89, Ex. 1) is

(Continued on following page)

class representatives will not cure all that is wrong with this case. Federal Rule of Civil Procedure 23(c)(1) "merely authorizes amending the certification order on the basis of new facts that emerge in the course of the litigation; it presupposes a valid order." *Isaacs v. Sprint Corp.*, No. 01-8016, 2001 WL 930177, at *2 (7th Cir. Aug. 14, 2001). Thus, the Court is left with two options: decertify the class and allow the filing of a third amended complaint or dismiss this action without prejudice to its refiling. For the following reasons, the most prudent option, dismissal, is appropriate.

Plaintiff relies on Louis Black's standing at the time this case was filed to avoid dismissal, but the Court is troubled by the brief appearance of Black in this action. It is possible that he decided he did not want to proceed as a class representative and, thus, was deleted from the second amended complaint. It is also possible that counsel decided not to include him in the second amended complaint because he would not be an adequate representative. In any event, Plaintiff has failed to cite any authority that the claim of a plaintiff who is dismissed from an action after its filing but prior to certification (and the filing of the motion for certification) sustains a case-or-controversy over which the Court has jurisdiction. The Court also is troubled by Plaintiff's attempt to split the standing issue between Morlan and Black by stating that Morlan's claims against certain Defendants arose after his 1990 bankruptcy and that, with respect to another

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insufficient to constitute a valid abandonment of Morlan's claims under the Bankruptcy Code. *See* 11 U.S.C. § 554.

Defendant, United Trust,[3] Black had standing to pursue the claims. Again, the Court is uncomfortable basing its jurisdiction on the claims of a plaintiff that is no longer a party to this action.[4] In that regard, the Court also will not base its jurisdiction on Plaintiff's alternative argument that Morlan has standing to pursue his claims against United Trust under a fraudulent concealment theory (*see* Doc. 132, p. 9 n.3).

Practically speaking, dismissal without prejudice is the wiser option. As indicated in *Walters*, this does not bar the filing of a new case if counsel can locate life insurance salespersons who sold insurance for Defendants with standing to pursue these claims. 163 F.3d at 437. According to Plaintiff's motion for substitution of the class representative (Doc. 96), three such persons are ready and willing to proceed. Whether this action is dismissed without prejudice to refiling or decertified, in either instance, Plaintiffs will need to file another complaint, and whatever new discovery is needed will be conducted. The parties should welcome an opportunity to start with a clean slate to cure all of the deficiencies that exist in the present action. While this decision may elevate form over substance, this Court simply is unwilling to expend the

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[3] In its brief, Plaintiff does not designate the proper name of Defendant "United Trust" (*see* Doc. 132). Because the Court does not wish to guess whether Plaintiff is referring to Defendant United Trust Assurance Company or Defendant United Trust Group, Inc., the Court likewise will refer to that Defendant as "United Trust."

[4] As described above, the class and putative class members do not have a legal status separate from and independent of the named Plaintiff, David A. Morlan, because the class was not properly certified. *See Whitlock v. Johnson*, 153 F.3d 380, 383-84 (7th Cir. 1998).

parties' and the judiciary's resources to proceed any further with this procedurally marred case because, in the end, the Court believes that any further action would be held for naught by the Court of Appeals.

As an aside, the Court must note that this all could have been avoided by a single step over one year ago. At the *very* latest, Plaintiff's counsel should have inquired into Morlan's previous bankruptcies when Defendants served their Second Set of Interrogatories and Requests for Production of Documents in early June 2000. At that point, Plaintiff's counsel could have filed a third amended class action complaint to add a named plaintiff with standing (or those individuals that counsel now seek to substitute) before the class certification motion was argued on August 1, 2000, and granted on August 28, 2000. While Defendants would have been allowed to conduct additional discovery regarding the new plaintiff(s) and additional briefing on class certification would have been necessary, the resultant delay would have been far less than what will result from the dismissal and refiling of this action. The Court anticipates that this action will be refiled and expects that more careful attention will be paid to establishing a sound foundation for these claims.

For the foregoing reasons, Plaintiff's motion for substitution (Doc. 96) is **DENIED**, and Defendant's motion to dismiss or, alternatively, to decertify (Doc. 83) is **GRANTED in part and DENIED in part.** This action is hereby **DISMISSED without prejudice** for want of standing. Because this Court never acquired jurisdiction over the present action, all previous rulings in this litigation are hereby **VACATED**, in order that they will have no preclusive effect if a new lawsuit is filed. *See Walters*, 163 F.3d at 437. The parties shall bear their own costs.

IT IS SO ORDERED.

DATED this 18th day of Sept., 2001.

/s/ G. Patrick Murphy
G. PATRICK MURPHY
Chief United States District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 20, 2002

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

No. 01-3795

DAVID A. MORLAN,
Plaintiff-Appellant,

v.

UNIVERSAL GUARANTY LIFE INSURANCE COMPANY, UNITED TRUST ASSURANCE COMPANY, UNITED SECURITY ASSURANCE COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. 99 C 274

G. Patrick Murphy,
Chief Judge.

ORDER

On August 9, 2002 defendants-appellees filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.